

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

DAVID C. BATES, #1425670

§

VS.

§

CIVIL ACTION NO. 6:13CV371

DIRECTOR, TDCJ-CID

§

ORDER OF DISMISSAL

The above-entitled and numbered petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 was heretofore referred to United States Magistrate Judge Judith K. Guthrie. The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Petitioner has filed objections.

Having made a *de novo* review of the objections raised by Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and Petitioner's objections are without merit. Specifically, the Magistrate Judge has documented that Petitioner previously filed a federal petition challenging this same conviction pursuant to § 2254 in *Bates v. Director TDCJ-CID*, 6:10cv3 (E.D. Tex. June 30, 2010) (date of dismissal with prejudice). Accordingly, Petitioner filed his instant petition successively, but without having obtained permission from the United States Court of Appeals for the Fifth Circuit to do so. *See* 28 U.S.C. § 2244(b)(3). In his objections, Petitioner contends that he should be allowed to file his second petition, in which he claims to have found "newly discovered testimony," because "he is a *pro se* litigant and not a lawyer and should be held to less strict standards than a writ drafted by a lawyer." *See* Objections at 1-2. He is incorrect. Section 2244(b)(3) makes no exception for *pro se* litigants who have not

obtained the Court of Appeals' permission to file a successive petition in the District Court. Therefore, his objections are without merit and his federal petition must be dismissed. Dismissal without prejudice is appropriate.

The Court notes that Petitioner has also filed a Motion for Leave to File Notice of Appeal (docket entry #10) and a Motion for Leave to Proceed *In Forma Pauperis* on Appeal (docket entry #11). He ostensibly filed both in the Fifth Circuit, but has also filed copies of the motions here. The Fifth Circuit is where he must start in order to obtain permission for his successive filing in the first place; this Court has no jurisdiction to proceed in his case absent the Fifth Circuit's permission. Accordingly, to the extent he intended that this Court should act on his motions, the Court has no power to do so and they will be denied as moot.

It is therefore

ORDERED that the Petitioner's petition for habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED** and the case is **DISMISSED** without prejudice. Petitioner may refile his petition at such time, and only at such time, as he obtains leave from the Fifth Circuit Court of Appeals to file a successive petition. A certificate of appealability is **DENIED**. All motions by either party not previously ruled on, including specifically Petitioner's Motions for Leave to File Notice of Appeal and for Leave to Proceed *In Forma Pauperis* on Appeal (docket entries #10 & 11), are hereby **DENIED** as **MOOT**.

It is SO ORDERED.

SIGNED this 8th day of August, 2013.

A handwritten signature in black ink, appearing to read "Michael H. Schneider", is written over a horizontal line.

MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE